Nos. 92-757 and 92-938

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BARBARA LANDGRAF,

Petitioner,

—v.—

USI FILM PRODUCTS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAURICE RIVERS and ROBERT C. DAVISON,

Petitioners,

—v.—

ROADWAY EXPRESS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, INC., AND ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, AS MEMBERS OF NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Stanley Mark
Asian American Legal Defense
& Education Fund
99 Hudson Street
New York, New York 10013

Angelo N. Ancheta
Kathryn K. Imahara
Asian Pacific American Legal
Center of Southern California
1010 South Flower Street
Los Angeles, California 90015

Denny Chin
Counsel of Record
Ellen A. Harnick
Vladeck, Waldman, Elias
& Englehard, P.C.
1501 Broadway, Suite 800
New York, New York 10036
(212) 354-8330

Doreena Wong
Asian Law Caucus, Inc.
468 Bush Street
San Francisco, California 94108

April 30, 1993

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

ARGUMENT 3

POINT I

THE PLAIN LANGUAGE OF THE 1991 ACT REQUIRES THAT IT BE APPLIED TO PENDING CASES 3

POINT II

THE PUBLIC POLICY CONSIDERATIONS STRONGLY SUPPORT APPLICATION OF THE 1991 ACT TO PENDING CASES 6

A. The Purposes of the 1991 Act 6

B. The Failure to Apply the 1991 Act To Pending Cases Will Leave Many Victims of Discrimination Without A Remedy 8

C. Victims of Discrimination in Pending Cases Who Have Proven their Entitlement to Relief Under Title VII are Entitled to the Remedies Congress Made Available Through the 1991 Act 10

D. Employers Will Not Be Prejudiced Nor Will Manifest Injustice Result From Application of the 1991 Act to Pending Cases 11

CONCLUSION 15

STATEMENTS OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

Cases PAGE

Adams v. Brinegar, 521 F.2d 129 (7th Cir. 1975) 14

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 6, 7, 10, 11

Antonio v. Wards Cove Packing Co., Nos. 91-35306, 91-35861 (9th Cir.) 3

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 11, 14

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 11, 14

Bridges v. Eastman Kodak Co., 800 F. Supp. 1172 (S.D.N.Y. 1991) 12

Croce v. V.I.P. Real Estate, 786 F. Supp. 1141 (E.D.N.Y. 1992) 12-13

Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556 (1967) 11

EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988) 13

Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993) 3-5

FDIC v. 232, Inc., 920 F.2d 815 (11th Cir. 1991) 14

FDIC v. Wright, 942 F.2d 1089 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992) 14

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 6,7

Franklin v. Gwinnett County Public Schools, 503 U.S. ___, 117 L. Ed. 2d 208 (1992) 9, 10

PAGE

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 6, 7

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 5

Gersman v. Group Health Association, Inc., 975 F.2d 886 (D.C. Cir. 1992) 5

Jackson v. Bankers Trust Co., No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 (S.D.N.Y. 1992) 12, 13

Kirkbride v. Continental Casualty Co., 933 F.2d 729 (9th Cir. 1991) 14

Koger v. Ball, 497 F.2d 702 (4th Cir. 1974) 14

Littlefield v. McGuffey, 954 F.2d 1337 (7th Cir. 1992) 14

Luddington v. Indiana Bell Telephone Co., 966 F.2d 225 (7th Cir. 1992) 13

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) ..... *passim*

Pension Benefits Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 14

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986) 4, 5

United States v. Alabama, 362 U.S. 602 (1960) 13

United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984) 14

United States v. Menasche, 348 U.S. 528 (1955) 4

United States v. O'Connell, 890 F.2d 563 (1st Cir. 1989) 14

PAGE

United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989) 14

United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) 14

Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) ..... *passim*

Wisdom v. Intrepid Sea-Air-Space Museum, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 (S.D.N.Y. 1992) (appeal pending) 12

Statutes

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ..... *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ..... *passim*

Title IX of the Education Amendments of 1970, 20 U.S.C. §§ 1681–1688 9

42 U.S.C. § 1981 ..... *passim*

Miscellaneous

United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992) 1, 2

Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, New York Times, July 24, 1991, p. A1 6

INTEREST OF AMICI CURIAE

This brief is respectfully submitted by the Asian American Legal Defense and Education Fund, the Asian Law Caucus, Inc., and the Asian Pacific American Legal Center of Southern California, as members of the National Asian Pacific American Legal Consortium, Inc., and other Asian American civil rights and civil liberties groups[1] as amici curiae in support of petitioners' appeals from the decisions below holding that the Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act" or the "Act") does not apply to cases pending when it became law. For the reasons set forth below and in the briefs of petitioners and other amici in support of petitioners, the amici herein urge the Court to reverse and hold that the Act *does* apply to pending cases.

Employment discrimination is one of the principal problems facing Asian Americans today, and all the amici herein are committed to the goals of eliminating discrimination in employment against Asian Americans and ensuring the fair and equal treatment of Asian Americans in all aspects of society.[2]

The United States Commission on Civil Rights recently highlighted the problems encountered by Asian Americans in employment:

> Asian Americans face a number of barriers to equal participation in the labor market. Many of these barriers are

---

1 Petitioners and respondents in both cases have consented to the filing of this brief. Appended to this brief are statements of the organizations that have joined in this brief as amici curiae.

2 With a population of roughly 7.3 million, Asian Americans today make up almost 3% of the population of the United States. Over the past decade, Asian Americans have increased dramatically in number from 1.5% to 2.9% of the total population. The rate of the population growth of Asian Americans in the United States from 1980 to 1990 was 107.8%, more than double the rate for Hispanics (53%) and far exceeding the rates for Whites (6%) and Blacks (13.2%) during the same period. United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992) ("USCCR Report") at 13-15.

> encountered to a greater degree by the foreign born, who often confront linguistic and cultural barriers to finding employment commensurate with their education and experience, but even third- or fourth-generation Asian Americans find their employment prospects diminished because employers have stereotypical views of Asians and prejudice against citizens of Asian ancestry. Employment discrimination, to varying degrees, is a problem facing all Asian Americans. . . . [E]mployment discrimination against Asian Americans ranges from discrimination based on accent or language, to discrimination caused by our nation's immigration control laws, to artificial barriers preventing many Asian Americans from rising to management positions for which they are qualified.

USCCR Report at 130.

Hence, the issue of the applicability of the 1991 Act to pending cases is a question of great importance to the Asian American community, for if the decisions of the Fifth and Sixth Circuits in these cases are affirmed, many victims of employment discrimination will find themselves with drastically limited remedies—or no remedy at all. As this Court has repeatedly recognized, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), is to be construed liberally to further its goals of eradicating discrimination and making victims of discrimination whole; those goals will only be frustrated by affirmance of the decisions below.

The language of the 1991 Act strongly supports the view that it should be applied to pending cases generally, for Section 402(a) states that "this Act shall take effect upon enactment." When Congress did not want the Act to be applied to a particular pending case or to particular conduct that occurred before its enactment, Congress *explicitly* so provided. From the point of view of the Asian American community, the irony is that Congress explicitly provided that the 1991 Act was not applicable to a pending case that had been brought by a group of Asian Pacific American workers. Section 402(b) explicitly

provides that the Act shall not be applied to *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Although the Act was passed in part because of Congress's recognition that the *Wards Cove* decision "weakened the scope and effectiveness of Federal civil rights protections" (1991 Act § 2), the workers who had fought the *Wards Cove* case for twenty years were explicitly denied the Act's protections. While the *Wards Cove* exemption should certainly be repealed,[3] its inclusion demonstrates that the Act should be applied to pending cases generally.

ARGUMENT

POINT I

THE PLAIN LANGUAGE OF THE 1991 ACT REQUIRES THAT IT BE APPLIED TO PENDING CASES

The plain language of the 1991 Act demonstrates that it should be applied to pending cases. First, Section 402(a) of the 1991 Act states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect *upon enactment*." (Emphasis added). This language plainly provides for the 1991 Act to take effect immediately, and it gives " 'some indication that [Congress] believed that application of [the Act's] provisions was urgent'." *Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993) (quoting *In re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984)). More-

---

3 The *Wards Cove* exemption is being attacked on both the legislative and judicial fronts. A bill to amend the 1991 Act by deleting Section 402(b) is pending in the House of Representatives. H.R. 1172, 103d Cong., 1st Sess., entitled "The Justice for *Wards Cove* Workers Act." The *Wards Cove* case is itself still being litigated in the Ninth Circuit, and some of the amici herein have argued that the *Wards Cove* exemption in the 1991 Act violates the Equal Protection Clause of the Constitution by singling out a group consisting primarily of Asian American workers and that it also violates the Separation of Powers Clause in that Congress has impermissibly attempted to control the outcome of a particular litigation. *Antonio v. Wards Cove Packing Co.*, Nos. 91-35306, 91-35861 (9th Cir.).

over, the language of Section 402(a) does not on its face exclude or carve out any exception for pending cases.

Second, when Congress did *not* want provisions of the 1991 Act to apply retroactively, it *explicitly* so provided. Thus, Section 402(b)—the *Wards Cove* exemption—declares that "nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."[4] Likewise, Section 109(c) of the Act, which extends Title VII to United States citizens working for American companies abroad, states that it "shall not apply with respect to conduct occurring before the date of the enactment of this Act."

When Sections 402(a), 402(b) and 109(c) are read together, it is clear that the "[e]xcept as otherwise specifically provided" language in Section 402(a) refers to Sections 402(b) and 109(c), for those are the "only provisions of the Act that can be read as specifically departing from the general rule." *Estate of Reynolds*, 985 F.2d at 473. Hence, when read in the light of the 1991 Act as a whole, Section 402(a) can only mean that the Act *must* be applied to pending cases in general. Any other interpretation would render Sections 402(b) and 109(c) meaningless, thereby violating the basic tenet of statutory construction that a statute is not to be read so that any portion will be rendered superfluous. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Several courts have held that Sections 109(c) and 402(b) were intended merely as "insurance policies" to protect against retroactive application of the two provisions in the event that the courts were to determine that the 1991 Act as a whole was

4 The only case that fits this description, of course, is *Wards Cove*.

to be applied to pending cases. *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 890 (D.C. Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992) ("retroactivity opponents 'hedged their bets' by expressly making specific provisions . . . prospective only"). Although the courts in *Gersman* and *Fray* acknowledged that Sections 109(c) and 402(b) would be rendered inoperative by a decision that the 1991 Act did not apply to pending cases, they reasoned that this was precisely what Congress intended.

The reasoning of the courts in *Gersman* and *Fray* should be rejected, for it undermines the long-standing principles of statutory construction set forth in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510 n.22. Moreover, as the Ninth Circuit recognized in *Estate of Reynolds*, 985 F.2d at 478, Sections 109(c) and 402(b) are not worded as mere "redundant assurances," and if they were only intended to be "insurance policies," they would have been worded differently. As the court observed:

> If the statutory language of those sections read: "Notwithstanding any judicial construction concerning the retroactivity of this Act in general, this section shall not apply with respect to conduct occurring before the date of enactment of this Act," we would have an entirely different case. But sections 402(b) and 109(c) as actually enacted simply do not read like insurance clauses.

985 F.2d at 478.

The Ninth Circuit recognized in *Estate of Reynolds* that some members of Congress probably voted in favor of Sections 402(b) and 109(c) with the belief that these sections would be construed by the courts as "insurance" clauses, and that other members probably voted for these sections with the belief that the language of these sections would compel the courts to find that the 1991 Act in general applied to pending cases. Given the "clear text of the Act," the court held that those individual members' beliefs are unimportant. 985 F.2d at 478. Regardless

of the beliefs of individual members of Congress as to the desirability of applying the Act to pending cases, "the legislators as a body enacted a statute that, consistent with established principles of statutory construction, can only be read one way," *id.*, namely, in favor of application to pending cases.

Finally, the plain language of the 1991 Act should be construed in light of Supreme Court precedent requiring the liberal construction of civil rights laws, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), which, as set forth at Point II, *infra*, supports the application of the 1991 Act to pending cases.

POINT II

THE PUBLIC POLICY CONSIDERATIONS STRONGLY SUPPORT APPLICATION OF THE 1991 ACT TO PENDING CASES

A. The Purposes of the 1991 Act

In the year prior to the enactment of the 1991 Act, Congress appointed a committee of lawyers and judges to study the Federal court system. The committee found that, because the remedies available to victims of employment discrimination were generally limited to backpay, the monetary stakes were often so small that, "even with the potential to recover attorneys fees, claimants sometimes find it difficult to litigate in Federal court because they cannot find counsel to take their cases." Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. Times, July 24, 1991, p. A1, As a result, individuals who have been denied employment opportunities on the basis of race or sex, or any other basis unlawful under Title VII, have been left without a remedy, and a legislative scheme that relies heavily on the work of "private attorneys general" has been hindered by the economic impediments to the vindication of federal statutory rights by individuals.

Thus, when it enacted the 1991 Act, Congress expressly found that additional remedies were needed both to provide victims of discrimination with additional protections against discrimination, and to enhance the effectiveness of the laws prohibiting discrimination in employment. Section 2 of the 1991 Act provides:

> The Congress finds that—
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections and; (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

As this Court has long made clear, Title VII is to be construed liberally to further its goals of eradicating discrimination in the workplace and making whole the victims of discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226, 228, 233 n.20 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). It was against the backdrop of this judicial precedent and the diminished effectiveness of the civil rights laws that Congress enacted the 1991 Act.

If the Court determines that the 1991 Act should not be applied to pending cases, victims of unlawful discrimination who succeed in proving unlawful conduct on the part of an employer will be deprived of the remedy Congress has determined is necessary to make victims of discrimination whole for their injuries. Even worse, victims of discrimination who, prior to this Court's decision in *Patterson*, chose to pursue their claims under 42 U.S.C. § 1981, rather than under Title VII, will find themselves with no remedy at all.

B. The Failure to Apply the 1991 Act To Pending Cases Will Leave Many Victims of Discrimination Without A Remedy

Prior to this Court's decision in *Patterson*, individuals who suffered discrimination on the basis of race in connection with an employment decision believed that they could choose between pursuing their claims under Title VII and pursuing their claims under 42 U.S.C. § 1981. If an individual chose the former, he or she would have had to comply with the administrative prerequisites of Title VII by filing a charge of discrimination with the EEOC within 180 (or 300) days of the challenged employment decision. 42 U.S.C. § 2000e-5(e). He or she then would have had to wait 180 days from the date on which the charge was filed to request that the EEOC issue a notice of right to sue. 42 U.S.C. § 2000e-5(f). Based on the pre-*Patterson* assumption that all claims of race discrimination in employment were actionable under 42 U.S.C. § 1981, many individuals chose simply to pursue their claims under 42 U.S.C. § 1981, either because they did not believe their claims could be resolved through the EEOC, or because they wished to recover compensatory damages previously unavailable under Title VII, or both. For those individuals who intended to pursue their claims through litigation, this choice not only implemented their individual preferences, but it also avoided the needless expenditure of EEOC resources, preserving those resources for those individuals who wished to attempt to resolve their claims administratively.

While the decision not to file a charge of discrimination with the EEOC meant foregoing their claims under Title VII, prior to *Patterson*, victims of race discrimination had no reason to worry about foregoing such claims, since a remedy was widely understood to be available under 42 U.S.C. § 1981. Unfortunately for those individuals who forbore pursuing their Title VII claims in reliance on that understanding and had actions pending at the time that *Patterson* was decided, that decision was applied retroactively, thereby not only depriving them of

the remedies available under 42 U.S.C. § 1981, but actually depriving them of *any* remedy whatsoever. These individuals will find themselves without any remedy for the unlawful discrimination to which they were subjected. The application of the 1991 Act to pending cases is necessary in order to enable individuals in these circumstances to vindicate their federal statutory rights.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. ____, 117 L. Ed. 2d 208, 218 (1992), the Court reiterated the general rule, derived from the English common law, that "all appropriate relief is available in an action brought to vindicate a federal right." While *Franklin* involved a federal statutory right as to which a private right of action was implied and, as to which, therefore, "Congress [had] given no indication of its purpose with respect to remedies," *id.*, the analysis set forth there is instructive. This analysis demonstrates the appropriateness of making the remedies set forth in the 1991 Act available to individuals who prevail in discrimination cases pending when the Act became law.

Franklin involved a claim by a high school student under Title IX of the Education Amendments of 1970, 20 U.S.C. §§ 1681–1688 ("Title IX"), challenging acts of sexual harassment committed by a teacher at the school. 503 U.S. at ___, 117 L. Ed. 2d at 215. Addressing the inadequacy of the traditional equitable remedies, including backpay, for a victim of sexual harassment who has not suffered a loss of wages, the Court held that monetary damages were available in order to avoid leaving such a victim "remediless." 503 U.S. at ___, 117 L. Ed. 2d at 223-24. The Court held,

> [I]n this case the equitable remedies [backpay and prospective relief] suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—the person she claims subjected her to sexual harass-

ment—no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all.

Franklin, 503 U.S. at ___, 117 L. Ed. 2d at 223. This analysis should guide the Court's decision with respect to the remedies that will be made available to victims of discrimination whose claims were pending when the Act was passed. If the Court holds that the Act does not apply to pending cases, many proven victims of unlawful discrimination will be left with inadequate remedies, and many others will be left "remediless."

C. Victims of Discrimination in Pending Cases Who Have Proven their Entitlement to Relief Under Title VII are Entitled to the Remedies Congress Made Available Through the 1991 Act

Plaintiffs in pending cases who succeed in proving unlawful discrimination in the terms and conditions of their employment should receive the benefit of all the remedies provided by Congress to make whole victims of discrimination. In analyzing the equitable powers of the courts to fashion a remedy under Title VII, this Court has stressed the remedial purposes of Title VII, and noted,

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The Court has stated that,

> Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

Albemarle Paper Co. v. Moody, 422 U.S. at 419 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The Court's reasoning with regard to the scope of a court's equitable powers to effect the remedial purposes of Title VII explains why the remedies provided by Congress to "eliminate the discriminatory effects of the past" should not be withheld from individuals whose cases were pending at the time the 1991 Act was passed.

The goals of the federal laws prohibiting discrimination in employment, as recognized by this Court and as reiterated by Congress in Section 2 of the 1991 Act, should not be hindered by a reading of the Act that requires the cases pending at the time of its enactment be decided under the law that the 1991 Act was enacted to replace. In light of the principles requiring the liberal construction of civil rights laws in order to further their goals of eliminating unlawful discrimination, the Act should be applied to cases pending at the time of its enactment.

D. Employers Will Not Be Prejudiced Nor Will Manifest Injustice Result From Application of the 1991 Act to Pending Cases

In many of the cases addressing the applicability of the 1991 Act to pending cases, the issue turned on the application of the principles of law articulated by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). For the reasons set forth in the briefs of petitioners and other amici, the *Bradley* decision should be applied in these cases. While those arguments will not be repeated here, two policy considerations should be emphasized.

First, the 1991 Act does not grant plaintiffs *additional* substantive rights; rather, its provisions simply augment the procedures by which plaintiffs may vindicate pre-existing rights. *See Denver and Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967) (holding that an act that did not change "substantive law" but only

affected "procedure" would be applied to cases pending when the act was enacted because " 'no one has a vested right to any given procedure' (citation omitted)"). This is particularly true with respect to the provisions of the 1991 Act allowing the right to a jury trial and compensatory and punitive damages. *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1177 (S.D.N.Y. 1991) (Carter, J.) ("The jury trial and damages provisions of the [1991 Act] at issue here do not grant plaintiffs additional substantive rights, but rather are more aptly described as augmenting the procedures by which plaintiffs may vindicate their pre-existing substantive rights."); *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 * 21-22 (S.D.N.Y. 1992) (Patterson, J.) (appeal pending); *Jackson v. Bankers Trust Co.*, No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 * 18 (S.D.N.Y. 1992) (Martin, J.); *Croce v. V.I.P. Real Estate*, 786 F. Supp. 1141, 1148 (E.D.N.Y. 1992) (Spatt, J.) (rejecting employer's argument that it had "a matured or unconditional right to be limited in exposure to only certain types of damages that flow from proscribed conduct"). This is also true with respect to the Section 101 of the 1991 Act, which reversed the limits on the scope of 42 U.S.C. § 1981 created by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), since conduct that is unlawful under Section 101 of the Act is already unlawful under Title VII. By permitting victims of race discrimination in employment to seek relief under 42 U.S.C. § 1981, the 1991 Act simply provides such victims with an alternative to Title VII and with remedies not previously available under Title VII.

Second, application of the 1991 Act to pending cases would *not* alter any of the existing rights of employers, for under existing law employers did not have any "right" to a bench trial or to be free from liability for punitive or compensatory damages. *Wisdom v. Intrepid Sea-Air-Space Museum*, No. 91 Civ. 4439, 1992 U.S. Dist. LEXIS 9424 at * 22 ("Defendant never had a vested or unconditional right to violate federal anti-discrimination laws."); *Jackson v. Bankers Trust Co.*, 88 Civ.

4786, U.S. Dist. LEXIS 6290 at ** 18-19 ("it cannot be said that requiring the defendant to submit to a jury trial and subject itself to expert fees and punitive damages alters any of defendant's existing rights"); *Croce v. V.I.P. Real Estate*, 786 F. Supp. at 1148 ("The prospect of a defendant facing a jury trial in lieu of a bench trial, or potential compensatory damages where none previously existed, simply does not impact on 'existing rights'."). *See also EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) ("Prospective-only application of the Pregnancy Discrimination Act would leave some of the Act's intended beneficiaries without remedy, while retroactive application would neither injure innocent third parties nor be inequitable to defendants . . . .").

While some courts have held that the availability of new remedies for conduct that has been unlawful at least since the enactment of Title VII implicates the existing rights of employers, *e.g.*, *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229 (7th Cir. 1992), this reasoning should be rejected, for it translates into a suggestion that an employer might *not* have discriminated had it known that it would be subject to a jury trial and compensatory and punitive damages—that employers might have acted differently had they known that the "cost" of discrimination would include not just backpay but also compensatory and punitive damages. Discrimination in employment has been absolutely prohibited by Federal law since 1964, however, and employers should not be permitted to put a price on discrimination. This Court should reject the view that employers have a vested right to discriminate under a "cost-benefit analysis." *Jackson v. Bankers Trust Co.* No. 88 Civ. 4786, 1992 U.S. Dist. LEXIS 6290 at * 20 (S.D.N.Y. 1992) (Martin, J.) ("the Court will not sanction any stance that employers have a right to discriminate under a cost-benefit analysis").

Significantly, other civil rights statutes have been held to be applicable to cases pending at the time of their enactment. *See, e.g.*, *United States v. Alabama*, 362 U.S. 602 (1960) (Civil

Rights Act of 1960); *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (amendment to Fair Housing Act removing cap on punitive damages); *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984) (amendments to Voting Rights Act); *Adams v. Brinegar*, 521 F.2d 129, 130 (7th Cir. 1975) (1972 amendments to Title VII); *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974) (same). Likewise, outside of the civil rights area, courts have also applied statutory changes to pending cases. *See, e.g., Kirkbride v. Continental Casualty Co.*, 933 F.2d 729 (9th Cir. 1991) (savings and loan); *FDIC v. 232, Inc.*, 920 F.2d 815 (11th Cir. 1991) (same); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990) (environmental); *United States v. O'Connell*, 890 F.2d 563 (1st Cir. 1989) (False Claims Act); *United States v. Pani*, 717 F. Supp. 1013, 1017 (S.D.N.Y. 1989) (False Claims Act). *See also Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (Multiemployer Pension Plan Amendments Act of 1980). There is simply no reason to distinguish the 1991 Act from other civil rights statutes or from other statutes such as the False Claims Act or the environmental laws or the savings and loan statutes.

Ultimately, the key in determining whether a statute should be applied to pending cases is whether "manifest injustice" would result. *Bradley*, 416 U.S. at 711; *see FDIC v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992) ("Any tension between [*Bowen* and *Bradley*] is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."). No vested rights would be disrupted by the application of the 1991 Act to pending cases. On the other hand, "manifest injustice" will surely result if victims of employment discrimination—who have been subjected to unfair, adverse treatment in the terms of their employment simply because of their sex or race—are left with remedies that Congress has acknowledged are wholly inadequate, or, if they are left with no remedy at all.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs of petitioners and other amici in support of petitioners, the decisions of the Fifth and Sixth Circuits should be reversed.

Dated: New York, New York
April 30, 1993

Respectfully Submitted,

DENNY CHIN
Counsel of Record
ELLEN A. HARNICK
VLADECK, WALDMAN, ELIAS
& ENGLEHARD, P.C.
1501 Broadway, Suite 800
New York, New York 10036

STANLEY MARK
ASIAN AMERICAN LEGAL DEFENSE
& EDUCATION FUND
99 Hudson Street
New York, New York 10013

ANGELO N. ANCHETA
KATHRYN K. IMAHARA
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street
Los Angeles, California 90015

DOREENA WONG
ASIAN LAW CAUCUS, INC.
468 Bush Street
San Fancisco, California 94108

APPENDIX

STATEMENTS OF AMICI CURIAE

The National Asian Pacific American Legal Consortium, Inc. ("NAPALC") was created in 1992 to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities through collaborative efforts and the formation of a national legal structure that pursues litigation, advocacy, education, and public policy development. NAPALC is comprised of three organizations dedicated to the protection of civil rights of Asian and Pacific Islanders: the Asian American Legal Defense and Education Fund ("AALDEF"), the Asian Law Caucus, Inc. ("ALC"), and Asian Pacific American Legal Center of Southern California ("APALC").

AALDEF is a not-for-profit civil rights organization that addresses critical issues facing Asian Americans through community education, advocacy and litigation. AALDEF's program priorities include the elimination of anti-Asian violence, immigrant rights, voting rights, employment and labor rights, and redress for Japanese Americans incarcerated in camps in the United States during World War II.

ALC is a non-profit, public interest legal organization whose mission is to promote, advance, and represent the legal and civil rights of the Asian and Pacific Islander communities. Since 1972, the ALC has provided free or low-cost multilingual legal services and community education in the areas of immigration, housing, employment and labor, and civil rights.

APALC is a non-profit legal organization dedicated to serving the Asian and Pacific Islander communities through direct legal services, community education, leadership development, and advocacy. Founded in 1983, APALC provides multilingual, culturally sensitive legal and education services, with programs focusing on immigration, family law, language

rights, inter-ethnic relations, dispute resolution, and civil rights advocacy.

The National Asian Pacific American Bar Association ("NAPABA") is a nationwide, non-profit, non-partisan organization of Asian Pacific American attorneys. Founded in 1989, NAPABA has over 3,000 members and is dedicated to serving the needs of Asian Pacific American attorneys and their communities. NAPABA was involved in efforts leading to the passage of the 1991 Act.

The Asian Pacific American Labor Alliance, AFL-CIO ("APALA"), is non-profit labor organization founded in 1992 to, among other things: (1) defend and advocate for the civil and human rights of Asian Pacific Americans, immigrants and all people of color; and (2) provide a vehicle within our society for the concerns of all Asian Pacific American workers. APALA is the first national Asian Pacific American labor organization in American history.

The Chinese American Citizens Alliance ("CACA") is a national civil rights organization established since 1895 dedicated to the promotion and protection of equal rights for all Chinese Americans. It is membership supported and conducts legislative advocacy, youth development, and community awareness and participation activities on national, state and local levels.

The Organization of Chinese Americans, Inc. ("OCA") is a non-profit, non-partisan advocacy organization that was founded in 1973. As one of the nation's oldest Asian American civil rights organization, OCA seeks to secure social justice, equal opportunity, and equal treatment of Chinese Americans and Asian Americans; and to eliminate prejudices and ignorance about Chinese Americans and Asian Americans.